IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JAMES ELLIS, III, *on behalf of himself and all similarly situated individuals* Plaintiff, v. SWIFT TRANSPORTATION CO. OF ARIZONA, LLC Defendant.	:	Civil Action No. 3:13cv473

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION
FOR LEAVE TO FILE HIS FIRST AMENDED COMPLAINT

COMES NOW the Plaintiff, James Ellis, III ("Ellis" or "Plaintiff"), by counsel, and in support of his Motion for Leave to File His First Amended Complaint, Plaintiff submits this Memorandum.

INTRODUCTION

Plaintiff commenced this case with a complaint alleging claims under 15 U.S.C. § 1681b(b)(2) and § 1681b(b)(3) of the Fair Credit Reporting Act for the Defendant's failure to comply with the statute during its procurement and use of consumer background reports as a means of evaluating consumers for employment. Plaintiff brought this case as a class action on behalf of all consumers who were the subject of background reports obtained by the Defendant as a precondition of employment during the five-years preceding the filing of Plaintiff's complaint. However, Plaintiff's counsel retained additional clients with identical claims against the Defendant as the current Plaintiff. Therefore, Plaintiff seeks to amend his complaint to include these additional consumers as named plaintiffs in this case.

ARGUMENT

I. STANDARD FOR GRANTING LEAVE TO AMEND

Fed. R. Civ. P. 15(a) provides that "a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." As the Supreme Court of the United States has declared, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In *Foman*, the Supreme Court listed factors that the district court should consider in deciding whether to grant leave to amend:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Id. (citation omitted).

The Fourth Circuit has found that "[W]hile Foman's enumeration of factors cannot be thought exclusive, they do embody a principle which focuses on prejudice or futility or bad faith as the *only* legitimate concerns in denying leave to amend, since only these truly relate to protection of the judicial system or other litigants. *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980) (emphasis added). Additionally, this Court has consistently decided similar issues in the spirit of Rule 15(a) and has applied it liberally. For example, this Court has held that, even in circumstances in which the plaintiff's success on the claim appears unlikely—a scenario which Plaintiff does not concede applies in the instant situation—"the merits of the Plaintiff's claims should not be considered in determining whether to allow amendment unless the proposed amendment may *clearly* be seen to be futile because of substantive or procedural considerations. *Fletcher v. Tidewater Builder's Ass'n*, 216 F.R.D. 584, 588 (E.D. Va. 2003) (emphasis added).

II. PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND

Based on the factors set forth in *Foman* and *Davis* and in the interests of justice, Plaintiff should be granted leave to file his First Amended Complaint.

A. The Defendant Would Not Suffer Unfair Prejudice

The Defendant would not be prejudiced if the Court were to permit the filing of an amended complaint. As one court has explained, "to show prejudice the party opposing the amendment of a complaint 'must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'" *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1189 n.8 (3d Cir. 1994) (quoting *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989). The Defendant will not suffer prejudice as a result of Plaintiff being allowed to file an amended complaint because the case is still in the fairly early stages of litigation. No significant deadlines have passed in this case and phase I discovery does not close until April 14, 2014. There is still a significant amount of time to conduct discovery with respect to the newly added Plaintiffs. Additionally, Plaintiff has not added any additional claims, but has only included additional named Plaintiffs who experienced the same alleged violations as the Plaintiff. Furthermore, the Defendant already had notice of these individuals because they are putative class members of the class that Plaintiff alleged in his original complaint.

B. The Amended Complaint Is Neither Futile Nor Sought After Undue Delay, and the Plaintiff Has Not Acted in Bad Faith.

As Plaintiff previously explained, no significant deadlines have yet passed in this case and discovery is still open. Thus, the Plaintiff has not delayed in filing his amended complaint.

Additionally, Plaintiff's amendment is neither futile nor has there been any "undue" delay in that it was obtained by bad faith on the part of the Plaintiff or with unfair prejudice to the Defendant. Defendant will not be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence." There is still plenty of time to conduct discovery in this case so as to provide the Defendant with the opportunity to defend against the additional Plaintiffs' claims.

Accordingly, because the Defendant would suffer no prejudice, as well as because the Plaintiff has not acted in bad faith or for a dilatory motive, Plaintiff respectfully requests that his Motion for Leave to File His First Amended Complaint be granted.

Respectfully submitted,
JAMES ELLIS, III
on behalf of himself and all similarly situated individuals

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send notification of such filing to the following:

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